

State of California
Department of Community Services and Development

ENERGY POLICY & PROCEDURES

EP 11-03

ISSUE DATE March 29, 2011

**EXPIRATION
DATE** March 31, 2012

TO Energy Program Contractors / Service Providers
 CSD Staff
 Other Interested Stakeholders

SUBJECT DOE ARRA Buy American Policy

PURPOSE The purpose of this policy is to provide an overview for DOE Energy Service Providers (Recipients) regarding Buy American Recovery Act provisions required under projects funded by the American Recovery and Reinvestment Act of 2009 and administered by the Office of Energy Efficiency and Renewable Energy (EERE). This policy is applicable to all DOE ARRA WAP contracts.

REFERENCE Code of Federal Regulations
 • 2 CFR Part 176, Subpart B
 American Recovery and Reinvestment Act of 2009 – Division A
 • Title XVI, Section 1605

**EFFECTIVE
DATE** Immediate Upon Issuance

Overview The Buy American provision of the American Recovery and Reinvestment Act of 2009 (section 1605 of Title XVI), provides that, unless one of three listed exceptions applies (nonavailability, unreasonable cost, and inconsistent with the public interest), and a waiver is granted, none of the funds appropriated or otherwise made available by the Act may be used for a *project* for the construction, alteration, maintenance, or repair of a public building or public work unless all the iron, steel, and manufactured goods used are produced in the United States.

If any of the funding for these eligible program activities is provided by the Recovery Act (ARRA), then the “project” is covered by the Recovery Act Buy American provisions. Activities that are not funded by the Recovery Act are not covered by the Recovery Act Buy American Provisions.

Non-Recovery Act funds may be leveraged alongside or in addition to Recovery Act funds without becoming subject to the Recovery Act Buy American provisions, if these funds are used for activities undertaken as distinct, segregable actions using separate financial assistance agreements, contracts or subcontracts, and are not commingled with Recovery Act dollars to fund any part of the same program activity and eligible activity.

What Qualifies as a Public Work

A public building or public work means a public building of, or a public work of, a governmental entity (the United States; the District of Columbia; commonwealths, territories, and minor outlying islands of the United States; state and local governments; and multi-state, regional, or interstate entities which have governmental functions). Federally recognized tribal governments are also considered governmental entities for the purpose of defining a “public building or public work.”

DOE advises that ownership will be the determinative factor when considering whether a building qualifies as a public building. If a federal, state or local government entity owns the building, then it is subject to the Buy American provisions. There may be some instances, such as a mixed-finance project, where the Buy American requirement applies even though a governmental entity does not have complete or direct ownership in the building. Further guidance on determining building ownership can be found in the Buy American Desk Guide located at the following link:

http://www1.eere.energy.gov/recovery/buy_american_provision.html

Guidance on Manufactured Goods

A manufactured good is defined as a good brought to the construction site for incorporation into the public building or work that has been processed into a specific form and shape or combined with other materials to create a material that has a different property than the individual raw materials.

There is no requirement with regard to the origin of components or subcomponents in manufactured goods used in a project, as long as the manufacturing occurs in the United States. To further clarify, if the parts at issue are components (or subcomponents) of a larger manufactured good that is domestically manufactured, or substantially transformed in the United States, then the Buy American Recovery Act requirement does not apply. Examples of what constitutes a manufactured good that is subject to the Buy American provisions can be found at the following link:

http://www1.eere.energy.gov/recovery/pdfs/eere_substantial_transformation_guidance.pdf

**Verifying
Place of
Manufacture**

The responsibility for determining whether the parts are components of a larger manufactured good, and whether the good is manufactured in the United States rests with the Recovery Act financial assistance recipient.

Recipients should consult with their own legal counsel concerning the basis for substantial transformation. Based on the requirements of the Recovery Act and OMB's guidance on the Recovery Act, DOE cannot approve or disapprove a Recovery Act recipient's determination that a manufactured good has been substantially transformed in the United States. However, DOE Contracting Officers may request additional information to support the credibility of the recipient's analysis of substantial transformation.

Recipients should include the Buy American requirements in all solicitations, Requests for Proposals (RFPs), agreements and sub-agreements. The language in the OMB Interim Final Guidance at 2 CFR 176.150 (for solicitations and RFPs) and 176.140 (for agreements and sub-agreements) should be helpful. Recipients should expect subrecipients and contractors to verify their compliance with the Buy American provisions.

Further information on this contract language is available at the following link:

http://www1.eere.energy.gov/recovery/pdfs/faq_international_trade_agreements_and_buy_american_provisions.pdf

**Required
Document
Support**

It is the recipient's responsibility to ensure that all information and documentation that supports a substantial transformation determination is accurate and complete and is retained for audit purposes. Such documentation can include the following:

1. Language in contractual documents that obligates sub-recipients and/or contractors to comply with the Buy American provisions;
2. Receipts for items produced domestically indicating such;
3. A documented certification from the contractor, vendor, distributor, supplier, or manufacturer verifying that the product was manufactured domestically;
4. Detailed and verifiable information supporting the claim that the manufactured good has undergone substantial transformation in the United States; and/or
5. Other reasonable documentation per the discretion of the state, local, or tribal government financial assistance recipient demonstrating compliance with the Buy American provisions.

Further guidance with respect to manufactured goods can be found at:

http://www1.eere.energy.gov/recovery/pdfs/eere_buy_american_documentation_guidance.pdf

Exceptions and Waivers

If recipients have reasonable doubt about the substantial transformation of a given manufactured good, and they believe that one of the exceptions outlined in the Recovery Act apply (such as domestic “nonavailability”), then the recipient may apply for a waiver based on that exception.

Recovery Act Exceptions and Waivers

The Recovery Act provides three (3) exceptions to the act:

1. The first exception is that applying the Buy American Recovery Act provisions would be inconsistent with the public interest.

The definition of “inconsistent with public interest” shall be interpreted by DOE on a case-by-case basis when considering waiver requests.

2. The second exception is that the iron, steel and relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality (“Nonavailability”).

The definitions of “sufficient and reasonably available quantities” and “of a satisfactory quality” shall be interpreted by DOE on a case-by-case basis when considering waiver requests. Applicants and recipients who would like to request a waiver of the Buy American requirements for their project based on its nonavailability, should prepare their request in accordance with the instructions provided in CFR 176.140(c), and in DOE’s guidance document at the link at the bottom of this section.

3. The third exception is that the inclusion of iron, steel, and manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent (“Unreasonable Cost”).

The definitions of “sufficient and reasonably available quantities” and “of a satisfactory quality” shall be interpreted by DOE on a case-by-case basis when considering waiver requests. Applicants and recipients who would like to request a waiver of the Buy American requirements for their project based on unreasonable cost, should prepare their request in accordance with the instructions provided in CFR 176.140(c) and (d) and 176.160(c) and (d), summarized at the link below.

http://www1.eere.energy.gov/recovery/pdfs/eere_program_guidance_buy_american.pdf

Reporting

Each month, agencies utilizing DOE ARRA WAP funds are responsible for reporting the number of dwellings weatherized that trigger the Buy American Provision.

These units need to be reported, even if the project qualified for one of the three (3) available waivers, and a waiver is granted.

Buy American dwellings are reported under the “Other Dwelling Types” category within the Expenditure Activity Reporting System (EARS).

**Further
Questions?**

More detailed guidance regarding Buy American Recovery Act provisions can be found in the form of a downloadable Desk Guide at the following link:

http://www1.eere.energy.gov/recovery/buy_american_provision.html

Please contact your assigned Field Representative with any questions or concerns regarding this policy.

This Energy Policy & Procedures document will be posted on-line. It will also be maintained in the Policy & Procedures Manual.
